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USTR FOR JENNIFER CHOE GROVES
STATE FOR EB/TPP/IPE JENNIFER BOGER

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SUBJECT: ECUADOR 2008 SPECIAL 301 REPORT

REF: State 9475

¶1. (SBU) Summary and recommendation. Post concurs with PhRMA recommendation that Ecuador remain on the Special 301 Watch List for ¶2008. Overall protection for IPR goods has not changed significantly over the past year, although the Ecuadorian Intellectual Property Institute (IEPI) has new, more assertive leadership and has made better use of available resources and improved its effectiveness. Despite increased enforcement activities on the part of IEPI and the Ecuadorian Customs, overall enforcement of IPR remains a key problem, resulting in high piracy levels in the software, publishing, recording, and film industries. Data exclusivity and protection continue to be a problem. Ecuador's health code permits granting marketing approvals without regard to whether or not a medication is patented. End summary and recommendation.

¶3. (U) Ecuador's comprehensive Intellectual Property law enacted in May 1998 was a step forward for IPR protection, covering copyright, trademark, patent, and semiconductor chip protection. It also addressed preliminary enforcement measures and other procedures, and required the creation of specialized IP courts. In addition, it created the Ecuadorian Intellectual Property Institute (IEPI).

IEPI

¶3. (SBU) The Ecuadorian Intellectual Property Institute (IEPI) is responsible for patent and trademark Registration, and is also the lead GOE agency to coordinate IPR enforcement. A new IEPI President, Alfredo Corral, was appointed in May 2007. According to Corral, IEPI has developed initiatives to reduce the backlog of trademark and patent registrations, hire additional personnel, and buy computers to provide a better service and push for stronger IPR enforcement. These efforts are supported by assistance from USAID and other donors. According to PhRMA, the backlog of pending patent cases within IEPI decreased in 2007 and patent examination productivity increased by 300 percent. Corral reported that IEPI is developing a national campaign to raise awareness of the importance of respecting intellectual property rights.

Enforcement

¶4. (SBU) Lack of enforcement remains a key problem for Ecuador. Production of pirate CDs is reaching large-scale levels. The recording industry estimates that more than 80 million CD-Rs and DVD-Rs legally enter Ecuador every year and a similar amount enters

as contraband, with most destined for piracy. This year, the International Intellectual Property Alliance (IIPA) did not take a position on Ecuador for the Special 301 process. However, in earlier reports, IIPA estimated that pirated products accounted for 98% of the domestic record and music industry in Ecuador in 2006, with estimated damage due to music piracy of USD 33 million. In contrast, the official market for recordings in Ecuador amounted to a mere 400,000 units in 2006, per IIPA, a 21 percent drop from 2005.

15. (SBU) The motion picture and gaming industries suffer equally from widespread CD and DVD copying. Business software piracy, both end-user piracy and pre-installed unlicensed software in new computers, continues to be a problem. Pervasive commercial photocopying piracy victimizes the book publishing industry, including for educational textbooks.

16. (SBU) Corral reported that IEPI and the Ecuadorian Customs have increased enforcement actions in their areas of competence, administrative sanctions imposed by IEPI or interception of counterfeit goods by Customs, when they can act without a formal complaint by the right-holder. According to IEPI the number of these enforcement actions increased from 3,826 operational cases in September 2006 to April 2007, to 11,260 cases in May to December 2007. However, criminal enforcement actions must be initiated by a prosecutor's office and enforced by the police. We do not have any indication that there was any appreciable change in criminal enforcement efforts in 2007, although without information from a centralized data collection point such as IIPA, that perspective is difficult to verify.

Legal Environment

17. (SBU) The Law on Intellectual Property of 1998 required the creation of specialized intellectual property courts, which to date have not been established. According to officials from the Ministry of Justice, the courts might not be created in 2008, because National Judiciary Council is waiting for the new National Constitution before making any significant reforms. This long-awaited action, if it comes to be, would improve IPR enforcement since Ecuador's judiciary in the past has largely been ineffective in enforcing the IP law. Post will provide more information when available.

18. (SBU) Reflecting potential positive change in the legal IPR environment in Ecuador, a court decision in 2006 that characterized efforts by a patent holder to remove illegal copies from the market as an illegal competitive practice was overturned on appeal. The court ruled in favor of the patent holder in October 2007.

TRIPS Compliance

19. (SBU) While the Ecuadorian Intellectual Property Law does provide for data exclusivity, as does TRIPS Article 39.3, marketing approval for copy products has been routinely granted based on data produced by research companies for the original drug. In addition, Instituto Izquieta Perez, the health authority, routinely provides sanitary registrations to copy products of patented drugs. According to PhRMA, the sanitary authorities have approved copies for all innovative pharmaceutical products covered by patents in Ecuador. A modification to Ecuador's health code in late 2006 permits sanitary registrations without regard to whether or not a medication is patented, which could further facilitate the marketing of patent-infringing pharmaceutical products. Ecuador, citing legal opinions from the Andean Court of Justice, has failed to provide patents for second uses.

Comment and Areas for Further Action

10. (SBU) The Correa administration, which took office in January 2007, has rarely spoken on IPR matters. It has given IEPI the autonomy to move forward with a moderately aggressive modernization effort, but otherwise has not shown a strong interest in increasing IPR enforcement. Likewise, it has not shown indications that it wants to reduce the current level of IPR protection or modify the current IPR law. However, some observers are concerned that a

competition law that is currently being drafted might have some provisions affecting IPR protection. Corral reported that a proposal to combine IEPI into a new competition agency has been dropped. The law is being drafted in a very closed process, but post will monitor the status of the competition law.

¶12. (SBU) Judges, local law enforcement and customs officials need training on intellectual property rights protection and enforcement. U.S. Patent and Trademark Office training in IP protection and enforcement is a useful tool.

¶13. (SBU) Ecuador should correct contradictions between its Health Code and its Intellectual Property Law, to prevent issuance of sanitary registrations to products that violate registered patents or to products whose applications are based on confidential data submitted by another company.

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